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No. 06-185

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JILL COTTRILL and MARY COMBS,

Petitioners,

v.

MFA, INCORPORATED, doing business as
MFA AGRI-SERVICES, INC.,
a Missouri Corporation

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners Jill Cottrill and Mary Combs brought a suit against MFA, Incorporated alleging only hostile work environment sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The District Court granted summary judgment on the basis that Petitioners did not subjectively perceive their work environment to be hostile. Relying on uniform and long-standing precedent, the Eighth Circuit agreed with the District Court's rationale and affirmed its decision. Is the Eighth Circuit's rationale in conflict with other Circuits' precedent involving the requirement that a Plaintiff must subjectively perceive discriminatory and harassing behavior in order to prevail on a hostile work environment claim based on Title VII?

STATEMENT PURSUANT TO RULE 29.6

Respondent, MFA, Incorporated, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATUTORY PROVISIONS AT ISSUE

Title VII of the Civil Rights Act of 1964, specifically, 42 U.S.C. § 2000e-2(a)(1).[1]

STATEMENT OF THE CASE

This case involves the routine application of a fundamental, uniform element of a hostile work environment case: the element of subjective perception of a hostile work environment. Petitioners' Petition for Writ of Certiorari should be denied because both the District Court and Eighth Circuit have applied uniform law to Petitioners' claims, and there are no novel issues involved in this matter.

Respondent MFA is an agricultural "feed and seed" company that employs approximately 1900 employees and operates over 150 local stores throughout the state of Missouri. MFA is headquartered in Columbia, Missouri which is roughly three hours from Albany, Missouri, where the complained of events occurred. MFA's president and CEO is Don Copenhaver, its Vice-President of Retail Stores is Bill Streeter, and its Vice President of Human Resources is Janice Schuerman. Petitioner Jill Cottrill was a bookkeeper for MFA's Albany store from 1987 to until after this lawsuit was filed. Petitioner Mary Combs was assistant bookkeeper for MFA's Albany store from 2001 until after this lawsuit was filed. Scott Adkins, the perpetrator, managed the Albany store from 1989 until he was terminated for the events upon which this case is based.

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1. Respondent MFA notes this for the sole reason that Petitioners' "RELEVANT PROVISIONS INVOLVED" contains a typographical error.

MFA has a very strict Code of Ethics and Sexual Harassment Policy. MFA's Code of Ethics and Sexual Harassment Policy is explicitly communicated to its employees in at least five different forms, including bulletin board postings, Handbook provisions, and a written statement made by MFA's president. MFA's Sexual Harassment Policy specifically provides that employees are to report any incidents of alleged harassment either to their department head or the Human Resources manager.

For at least six to twelve months, Petitioner Combs suspected that her supervisor, Scott Adkins, was peeping on her and her co-worker, Petitioner Cottrill, while they were using the restroom at MFA's Albany, Missouri store. During this timeframe, Petitioner Combs confided in her husband that she thought Mr. Adkins had a "peephole." Approximately six months before the peephole was found, Petitioner Combs conducted a secret investigation of the women's restroom, but did not uncover the peephole or any other evidence that Mr. Adkins was spying on Petitioners. Despite her failure to find any evidence of peeping, Petitioner Combs remained suspicious of Mr. Adkins, but continued to keep her suspicions to herself and her husband. She did not tell anyone at MFA or Petitioner Cottrill, who had no idea Mr. Adkins was peeping on her, about her suspicions regarding Mr. Adkins' activities.

On October 17, 2002, Petitioner Combs conducted another secret investigation of MFA's Albany store and discovered the peephole. This was the first time anyone had located the peephole. David Cottrill, the Vice-Chairman of MFA's Board of Directors and Petitioner Cottrill's brother-in-law, happened to be in the store at the time Petitioner Combs conducted this investigation. Petitioner Combs showed Mr. Cottrill the hole. This was the first notice given to MFA concerning even the suspicion of a peephole, let alone

the actual presence of one. In response, Mr. Cottrill immediately telephoned Don Copenhaver, MFA's CEO and President, to inform him of the situation. Mr. Copenhaver, in turn, called Bill Streeter, the Vice-President over Retail Stores, and Janice Schuerman, the Vice-President over Human Resources, to inform them of the situation.[2] After hearing the information from Mr. Copenhaver, Mr. Streeter called Kent Bryan, the Regional Manager for Albany, and the group set in motion a plan to catch the person who made the hole.[3] Thus, within roughly thirty minutes of learning of the hole, MFA's President, two Vice-Presidents, Vice-Chairman of the Board of Directors, and Regional Manager had begun investigating the present situation in one of its 150 stores.

Later that same day, Mr. Bryan called Ron Skiles, MFA's Manager of Computer Services, and they decided to secretly install a hidden camera in the Albany store to videotape the perpetrator. They could not install the camera on either Friday or Saturday because the store was open for business on those days and, therefore, planned to install the camera on Sunday. At MFA's suggestion, Petitioner Cottrill called in sick on Friday and Petitioner Combs, who regularly worked only part-time, worked half a day.

On Sunday, October 20, 2002, Mr. Bryan and Mr. Skiles drove to Albany and met with Petitioners and their husbands to discuss the details of the plan to identify the perpetrator.

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2. Mr. Copenhaver, Mr. Streeter, and Ms. Schuerman work out of MFA's Columbia headquarters, which is approximately 3 ½ hours from Albany.

3. Mr. Bryan works out of Mooresville, Missouri, which is approximately 1 ½ hours from Albany.

Both Petitioners agreed to assist in luring the perpetrator to the peephole. Later that evening, Mr. Bryan, Mr. Skiles and Petitioner Cottrill installed the hidden camera at the store. On Monday, October 21, 2002, Petitioners voluntarily used the restroom in an effort to catch the perpetrator on video. Again, Petitioner Cottrill left work around noon due to an agreed upon feigned sickness, and Petitioner Combs worked part-time.

On Monday evening, Mr. Bryan, Mr. Skiles, Board Member Cottrill, Petitioners, and Petitioners' husbands viewed the tape for the first time, which revealed Mr. Adkins peeping on Petitioners on four occasions earlier that day. The next morning, Tuesday, October 22, 2002, Mr. Bryan and Mr. Skiles intercepted Mr. Adkins as he arrived for work and immediately terminated his employment and offered Petitioners counseling. MFA then contacted law enforcement and Mr. Adkins was arrested. MFA turned the videotape and photographs over to law enforcement and fully cooperated with Mr. Adkins' prosecution. Mr. Adkins pled guilty to invasion of privacy and was sentenced. Both Petitioners continued their employment in their same positions at MFA.

Despite MFA's immediate success in rooting out the perpetrator and ensuring a safe working environment, Petitioners filed EEOC charges alleging that the unknown peeping had created a hostile work environment. Once the EEOC issued right to sue notices, Petitioners filed suit in which they alleged that the peeping and Mr. Adkins' alleged contamination of the women's toilet seat, violated Title VII. No direct or expert evidence supports the new allegation that Mr. Adkins had placed foreign substances on the toilet seat or that the alleged invisible substances can cause rashes, much less Petitioner Cottrill's alleged rash. Rather,

Petitioners merely speculate that it was Mr. Adkins who placed alleged invisible substances on the toilet seat. There is also no credible evidence that "several additional" peepholes were found. Mr. Adkins, who readily confessed to secretly peeping on Petitioner Cottrill for five years, denied creating more than one peephole and denied ever placing any substance on the toilet seat. After Mr. Adkins was terminated, MFA found soluble cornstarch in a baggy in the back room of the store, which is the substance Petitioner Cottrill identified as being on the toilet seat. There is no evidence in the record that cornstarch can be harmful if placed on a person's skin, nor is there any direct or expert evidence that the cornstarch was applied to the seat.

MFA filed Motions for Summary Judgment, Petitioners responded, and MFA filed a reply brief. On November 12, 2004, the United States District Court for the Western District of Missouri entered summary judgment in MFA's favor on all of Petitioners' claims. Petitioners appealed the District Court's decision to the Eighth Circuit Court of Appeals, which had jurisdiction over Petitioners' appeal pursuant to 28 U.S.C. § 1291. The Eighth Circuit affirmed the District Court's decision on April 7, 2006. Petitioners filed a Petition for Rehearing, which the Eighth Circuit denied by Order on May 9, 2006.

REASONS FOR DENYING THE PETITION

The decision of the Eighth Circuit Court of Appeals in this matter does not conflict with a decision of this Court or any Court of Appeals. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for their Petition to be granted. *See* Sup. Ct. R. 10.

I. The Eighth Circuit Court of Appeal's Decision in No Way Conflicts With the Decision of Any Other Circuits and, Accordingly, This Court Should Outright Dismiss Petitioners' Petition for Writ of Certiorari.

The Eighth Circuit Court of Appeals, in affirming the District Court's grant of MFA's motion for summary judgment, found that because Petitioners "did not subjectively perceive the peeping, [the Petitioners] may not rely on the peeping to establish that [their] work environment was hostile." *Cottrill v. MFA, Inc.*, 443 F.3d 629, 636 (8th Cir. 2006). The Eighth Circuit's proper refusal to consider the unknown peeping incidents as a factor in Petitioners' case is wholly consistent with the prevailing law of other Circuits and this Court.

Petitioners argue that the Eighth Circuit's holding is in conflict with a case decided by the United States District Court for the Middle District of Florida, *Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494 (M.D. Fla. 1995). Even if this were accurate, which it is not, as explained below, a Circuit Court's conflict with a ***District Court's*** ruling is not a sufficient basis for this Court to grant Petitioners' Petition for Writ of Certiorari. The United States Supreme Court Rules explicitly provide that this Court only has jurisdiction over cases in which "a United States court of appeals has entered

a decision in conflict with the decision of ***another United States court of appeals*** on the same important matter." Sup. Ct. R. 10(a). Petitioners have failed to point to any conflict between the Eighth Circuit's holding and other United States Court of Appeals' decisions.

II. The Eighth Circuit's Opinion Is Consistent With the Sole Case Cited by Petitioners in Support of Their Petition for Writ of Certiorari.

If the Court does consider *Liberti*, despite the fact that it is not a Circuit Court opinion, the Court will notice that *Liberti* is different from the instant case due to its ***factual***, as opposed to legal, background. In other words, the *Liberti* court applied the same common, universal elements of a hostile work environment, one of which is the subjective perception element. Petitioners are now boldly asking this Court to remove the subjective perception element from the hostile work environment analysis.

Again, contrary to Petitioners' assertions, the Middle District of Florida's opinion as to the requirements of subjective awareness of harassment is completely parallel to that of the Eighth Circuit's holding. Specifically, the Court in *Liberti* states, "Defendant correctly argues that incidents not known to an individual until after, for example, the individual's date of termination, could not have contributed to the individual's subjective view of a hostile environment." *Liberti*, 912 F. Supp. at 1504 - 05 (M.D. Fla. 1995). This is completely consistent with the Eighth Circuit's holding that a plaintiff may only rely on evidence relating to harassment that the plaintiff "was aware of during the time she was allegedly subject to a hostile work environment." *Cottrill*, 443 F.3d at 636.

The "subjective perception" element is universally applied in all Circuits. Specifically, other Circuits follow the same rationale as the Eighth Circuit in that a Title VII plaintiff "may only rely on evidence relating to harassment of which she was aware during the time that she was allegedly subject to a hostile work environment." *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 782 (10th Cir. 1995) (the plaintiff could not subjectively perceive her co-worker's actions unless she knew about the behavior); *Whittaker v. Northern Illinois Univ.*, 424 F.3d 640, 645 (7th Cir. 2005) (refusing to consider sexist and rude comments made by plaintiff's supervisor when the comments were made outside of plaintiff's presence and plaintiff was not aware of the comments while employed); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976, 978 (7th Cir. 2000) (noting that a supervisor's leering at the plaintiff without the plaintiff being aware of it, was irrelevant to the plaintiff's Title VII claim); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981 (6th Cir. 2000) (allegations of sexual harassment by plaintiff's co-employees by manager were irrelevant to plaintiff's Title VII claim absent evidence that plaintiff was contemporaneously aware of the alleged harassment); *Creamer v. Laidlaw Transit, Inc.*, 86 F.3d 167, 171 (10th Cir. 1996) (plaintiff may only rely on evidence relating to harassment of which she was aware during time she was allegedly subject to hostile work environment).

Even if this Court decides to compare the holding of the Eighth Circuit to the District Court's holding in *Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494 (M.D. Fla. 1995), this Court will find that the facts in these two cases dramatically differ. In *Liberti*, the district court denied the defendant's motion for summary judgment as to a Title VII claim for hostile work environment based on at least one

male employee, John Giangrossi, videotaping and peeping at female Disney dancers in their dressing rooms. *See Liberti*, 912 F. Supp. at 1505. As the Eighth Circuit explained in its factual analysis of *Liberti*

> Although the plaintiffs were not subjectively "aware of Giangrossi's identity and the exact nature and extent of his activities until after he was apprehended" in January 1992, as early as May of 1991 the dancers ***were aware of*** peepholes in their dressing area, in July of 1991 Disney told the dancers not to worry about any problems because a Disney employee ***had been caught "peeping"*** and had been fired, "[a]dditional and new holes were discovered after Mr. Giangrossi's arrest and termination, and the Plaintiffs continued to be concerned about the security of their dressing areas after January of 1992."

Cottrill v. MFA, Inc., 443 F.3d 629, 637 (8th Cir. 2006) (quoting *Liberti*, 912 F. Supp. at 1505) (emphasis added). In the present case, as the Eighth Circuit eloquently points out, there is no genuine issue of material fact as to Petitioner Cottrill's subjective awareness of Adkins' actions because Petitioner Cottrill readily admitted that she had no knowledge of Adkins' peeping until after the peephole was found.

CONCLUSION

Because the Eighth Circuit Court of Appeals' decision is in line with all other circuits with respect to the requirements of a plaintiff's subjective awareness of harassment, MFA, Incorporated respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari and affirm the Eighth Circuit Court of Appeals' decision.[4]

Respectfully submitted,

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4. It should be noted that Petitioners' Petition for Writ of Certiorari includes a section entitled "ARGUMENT QUESTION PRESENTED" where Petitioners reargue the merits of their reasons why MFA's motion for summary judgment should have been dismissed. This section is completely inappropriate in the current setting because a Petition for Writ of Certiorari is meant solely for the purpose of whether this Court will consider the holdings of the lower appellate court. This is not the proper time for Petitioners to argue the merits of their appeal and, accordingly, their Petition for Writ of Certiorari should be dismissed.